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10 **COUNTY OF LOS ANGELES and DEPUTY TRAVIS KELLY**
11 (*Defendants is exempt from filing fees pursuant to Government Code § 6103*)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSHUA ASSIFF,

Plaintiffs,

v.

COUNTY OF LOS ANGELES;
SHERIFF DEPUTY BADGE
NUMBER 404532; And DOES 1
through 10,

Defendants.

Case No.: 2:22-cv-05367 RGK(MAAx)

**DEFENDANTS' REPLY IN SUPPORT
OF THEIR MOTION TO DISMISS AND
TO STRIKE PLAINTIFF'S FIRST
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Action Filed: August 3, 2022
Pretrial Conference: July 10, 2023
Trial Date: July 25, 2023

Assigned to:
Hon. R. Gary Klausner, District Judge
Courtroom 850

All Discovery Matters Referred to:
Hon. Maria A. Audero, District Judge

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PLAINTIFF DOES NOT AND CANNOT SHOW UNLAWFUL ARREST**

3 As a preliminary matter, Plaintiff's allegations regarding the legality of the
4 manner in which he was operating his vehicle are irrelevant to the Court's inquiry
5 regarding the legality of the subject arrest. Plaintiff appears to be arguing that if there
6 was "not even probable cause for the traffic stop," then there cannot have been probable
7 cause for the subsequent arrest. First, "probable cause" is not the standard which applies
8 to traffic stops; second, even if it did, lack of probable cause for the traffic stop would
9 have no impact on probable cause for the subject arrest, as Defendant's Motion to
10 establishes that Plaintiff was arrested for violations of California *Penal Code* sections 69
11 (obstructing or resisting an officer) and 243(b) (battery against an officer). As such, the
12 only allegations which the Court may consider pertain to facts regarding Plaintiff's either
13 obstruction or resistance of a peace officer and/or battery against a peace officer.

14 Plaintiff attempts to rely on an allegation that only a "short amount of time
15 [passed] between KELLY's demand for Plaintiff's license and KELLY's use of force to
16 effectuate the arrest," to somehow argue that the arrest itself was unlawful. However,
17 Plaintiff provides no argument or legal authority showing why a reasonable peace officer
18 in KELLY's position could not have made a probable cause determination regarding the
19 subject arrest in this amount of time. In doing so, Plaintiff squarely ignores Defendants'
20 argument that his own allegations show that he verbally argued with a peace officer
21 regarding the legality of a turn, and that he declined to provide his driver's license to a
22 peace officer, even after he was advised that continued failure to comply would result in
23 an arrest, i.e. "going to jail." (FAC, ¶¶ 10, 12.)

24 Oddly, Plaintiff argues that his FAC contains no allegation that he "verbally
25 argued" but then cites that exact language for the Court, i.e. that "Plaintiff politely
26 protested his innocence." (FAC, ¶ 12.) Plaintiff then attempts to rely on artful
27 omissions of fact to argue that since there is "no allegation that Plaintiff refused to
28 produce his driver's license," Defendants cannot argue that Plaintiff failed to obey a

1 peace officer's command. However, the allegations clearly establish that Plaintiff either
2 "verbally argued" or "politely protested his innocence" for approximately 40 seconds
3 before he was advised that failure to provide his driver's license would result in an
4 arrest. (FAC, ¶ 12.) Moreover, Plaintiff has provided no legal authority to show that a
5 determination of obstruction/resistance under *Penal Code* section 69 cannot occur within
6 40-45 seconds. It is not surprising that no such authority exists, as it is well known and
7 accepted in our society that peace officers are required to make "split second" decisions.

8 Once again, it is notable that neither Plaintiff's First Amended Complaint nor his
9 Opposition identify any allegations showing that Plaintiff was not obstructing or
10 resisting an officer (California *Penal Code* section 69) or that Plaintiff did not commit
11 battery against an officer (California *Penal Code* section 243(b)) at any point during the
12 subject incident. Since Plaintiff's own allegations concede that he failed to cooperate
13 with and resisted a peace officer, he cannot establish that there was no probable cause for
14 his arrest for violations of California *Penal Code* sections 69 (obstructing or resisting an
15 officer) and 243(b) (battery against an officer).

16 **II. PLAINTIFF CANNOT SHOW THAT THE ALLEGED FORCE AND HIS**
17 **ARREST WERE CAUSED BY DEFENDANT COUNTY'S POLICY OR**
18 **CUSTOM**

19 In this litigation, Plaintiff claims to have suffered excessive force and unlawful
20 arrest [for violations of California *Penal Code* sections 69 (obstructing or resisting an
21 officer) and 243(b) (battery against an officer)]. Though Plaintiff alleges that the
22 underlying traffic stop was racially motivated (or without probable cause, as Plaintiff's
23 Opposition argues), neither the initial nor the First Amended Complaint state any claims
24 tied to the traffic stop itself. As discussed above, this Court's inquiry regarding
25 Plaintiff's claims for excessive force and unlawful arrest do not turn on the propriety of
26 the traffic stop.

27 Plaintiff asserts that "Defendants attempt to mislead the Court on the import of
28 Exhibit 1" when Defendant simply quoted the significant findings of Exhibit 1, as

1 alleged in the First Amended Complaint. And as Defendants' Motion demonstrates, the
2 allegations of Plaintiff's own First Amended Complaint concede that Exhibits 1 and 2 are
3 not relevant to Plaintiff's claims of excessive force and unlawful arrest. For example,
4 Plaintiff alleges that Exhibit 2 pertains to "traffic stops ... vehicle and [] person[]
5 search[e]s, ... backseat detentions, and ... [being] asked if they are on probation or
6 parole." (FAC, ¶ 21.) Plaintiff also concedes that Exhibit 1 pertains to "racial profiling
7 and discriminatory traffic stops." (FAC, ¶ 21.)

8 To the extent that Plaintiff may argue that Exhibit 1 tangentially address
9 "unreasonable force" in the context of a discriminatory traffic stop, Defendant argues
10 that Plaintiff's claims fail to establish racial profiling. Note that the only allegation of
11 racial profiling in this First Amended Complaint are that Plaintiff is African American;
12 there is no additional conduct or communications attributed to KELLY which show
13 racial profiling or discriminatory intent.

14 As such, Defendants maintain their position that Plaintiff's second cause of action
15 against the COUNTY should be dismissed with prejudice for failure to allege a causal
16 connection between the purported policy and custom and the claimed deprivation beyond
17 conclusory and misleading allegations. Moreover, Exhibits 1 and 2 should be stricken
18 from the First Amended Complaint as "immaterial, impertinent, or scandalous" matters.

19 **III. PLAINTIFF HAS CONCEDED DEFENDANTS' MOTION TO STRIKE**

20 Plaintiff fails to address and, thus, concedes various arguments raised in
21 Defendants' Motion. (See *Jenkins v. County of Riverside* (9th Cir.2005) 398 F.3d 1093,
22 1095 n. 4 (deeming plaintiff's failure to address, in opposition brief, claims challenged in
23 a motion, an "abandonment of those claims"); *Ramirez v. Ghilotti Bros. Inc.* (N.D. Cal.
24 2013) 941 F. Supp. 2d 1197, 1210 (holding that argument was conceded where the
25 defendant failed to address it in its opposition).)

26 Here, Plaintiff fails to address the following arguments made in Defendants'
27 moving papers:

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- That he fails to state an entitlement to punitive or exemplary damages (Defendants' Motion at pp. 9-10).
- That he fails to state an entitlement to restoration of property (Defendants' Motion at p. 10).

As such, Plaintiff concedes these arguments, and this Court may grant Defendants' Motion to Strike as to Plaintiffs' prayers punitive for exemplary damages and restoration of property.

IV. CONCLUSION

Based on the above, and the on the arguments raised in the moving papers, Defendants respectfully request this Court should grant Defendant's FRCP Rule 12 Motion and issue an order dismissing the present action forthwith.

Dated: January 13, 2023

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